51

Supreme Court, U.S.

06-10 · 2007

OFFICE OF THE CLERK

DOCKET NO.:

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

MARTYN D. BRUNO,

PETITIONER

v.

CONNECTICUT COMMISIONER OF CORECTION AND RICHARD BLUMENTHAL,

RESPONDENTS

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF *CERTIORARI*

BRIAN J. WOOLF, ESQ.
COUNSEL OF RECORD FOR THE PETITIONER
50 FOUNDERS PLAZA
EAST HARTFORD, CT 06108
TEL. NO. (860) 290-8690

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Second Circuit erred in denying petitioner's motion for a certificate of appealability and dismissing his appeal on the ground that the petitioner has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. Sec. 2253(c)?

TABLE OF CONTENTS

Page

Question Presented for Review.....i
Table of Cited Authorities.....iii
Citations.....vi
Basis for Jurisdiction.....vii
Constitutional Provisions and Statutes.....viii
Statement of the Case.....1
Argument as to the Reasons Relied on for Allowance of the Writ.....3

I. Standard of Review.....4
II. The Right to Jury Trial.....7
III. Ineffective Assistance of Trial Counsel.....8
IV. Ineffective Assistance of Appellate Counsel.....10
V. The Trial Court's Refusal to Review In Camera the School and Psychiatric Records of the State's Two Chief Witnesses Violated Petitioner's Right to Due Process under the U.S. Constitution, Amendment 14.....14
VI. Evidence on the Element of Intent was Insufficient to Support the Murder Conviction.....17

Conclusion.....19
Appendix.....I

TABLE OF CITED AUTHORITIES

A. CASES:

PAGE

Aetna Insurance Co. v. Kennedy,
301 U.S. 389 (1937).....7

Bell v. Jarvis
198 F.3d 432 (4th Cir. 1999).....11

Bloomer v. United States,
162 F.3d 187(1998).....9

Boykin v. Alabama,
395 U.S. 238 (1969).....12

Brady v. Maryland,
373 Conn. 83 (1963).....16

Bruno v. Commissioner of Correction,
74 Conn. App. 910 (2003).....2

Clark v. Stinson,
214 F.3d 315 (2nd Cir. 2000).....9

Dell' Orfano v. Romano,
962 F.2d 199 (2nd Cir. 1992).....8

Duncan v. Louisiana,
391 U.S. 145 (1968).....7

Evitts v. Lucey,
469 U.S. 387 (1985) 10

Gargiulo v. Delsole,
769 F.2d 77 (2nd Cir. 1985).....8

Gray v. Greer,
800 F.2d 644 (7h Cir. 1986).....11

Heyman v. Cline
456 F.2d 123 (2nd Cir. 1972).....7

Hohn v. United States
524 U.S. 236 (1998).....7

In re Winship,
397 U.S. 358 (1970).....17

Jackson v. Virginia,
443 U.S. 307 (1979).....18

Johnson v. Zerbst,
304 U.S. 458 (1938).....9

Jones v. Barnes.,
463 U.S. 745 (1983).....11

Marone v. United States,
10 F.3d 65 (2nd Cir. 1993).....12

Matire v. Wainwright,
811 F.2d 644 (11th Cir. 1987).....11

Mayo v. Henderson,
13 F.3d 528 (2nd Cir. 1994).....11

Miller-El v. Cockrell,
537 U.S. 322 (2003).....5,6,10,13,17.19

Pennsylvania v. Ritchie,
480 U.S. 39 (1987).....16,17

Slack v. McDaniel,
529 U.S. 473 (2000).....5,7

Smith v. Robbins,
528 U.S. 259 (2000).....10

State of Connecticut v. Austin,
244 Conn. 226 (1998).....18

State of Connecticut v. Bruno,
1996 W.L. 280243, *1, No. 18-73668
(Conn. Super. July 14, 1993).....13

State of Connecticut v. Bruno,
236 Conn. 514 (1996).....1, 19

State of Connecticut v. Bruno,
Docket No. 91-73668.....1

State of Connecticut v. Downey,
45 Conn. App. 148 (1997).....19

Strickland v. Washington,
466 U.S. 668 (1984).....9,11

Strozier v. Newsome,
871 F.2d 995 (11th Cir. 1989).....13

Tray-Wrap v. Six L's Packing Co., Inc.,
984 F.2d 65 (2nd Cir. 1993).....8

United States v. Bagley
473 U.S. 667(1985).....16

United States v. Chrans,
869 F.2d 1084 (7th Cir. 1989).....12

United States v. Coppa,
267 F.3d 132 (2nd Cir. 2001).....16

United States v. DeRobertis,
715 F.2d 1174 (7th Cir. 1983).....13

United States v. Leung,
40 F.3d 577 (2nd Cir. 1994).....16

Unites States v. Sammons,
918 F.2d 592 (6th Cir. 1990).....12

Wheel v. Robinson,
34 F.3d 60 (2nd Cir. 1994).....18

B. CONSTITUTIONAL PROVISIONS

Sixth Amendment to the United States Constitution...4,8,9,10
Fourteenth Amendment to the
United States Constitution.....4,7,14,16,17

C. STATUTES

Conn. Gen. Stat. Sec. 53a-7.....18
Conn. Gen Stat. Sec. 53a-8.....1
Conn. Gen. Stat. Sec. 53a-54a.....1
Conn. Gen. Stat. Sec. 53a-155(a)(1).....1
28 U.S.C. Sec. 2253 (c).....3,4,5
28 U.S.C. Sec. 2254.....3,4,6,19

CITATIONS

Martyn D. Bruno, Petitioner-Appellant v. Connecticut Commissioner of Correction, et al, Respondents-Appellees, United States Court of Appeals for the Second Circuit (Hon. Joseph M. McLaughlin, Hon. Richard C. Wesley, Circuit Judges and Hon. William K. Sessions, III, District Judge), Docket No. 06-5026-pr, Order dated March 13, 2007.

Martyn Bruno, Petitioner v. Connecticut Commissioner of Correction, et al, Respondents, Case No. 3:04-CV-101(RNC)(Hon. Robert N. Chatigny, U.S.D.J.), Ruling and Order dated September 29, 2006.

BASIS FOR JURISDICTION

The date of the order by the Circuit Court of Appeals for the Second Circuit sought to be reviewed was on March 13, 2007. 28 U.S.C. Sec. 1254(1) confers on the Supreme Court jurisdiction to review on a *writ of certiorari* the order in question.

CONSTITUTIONAL PROVISIONS AND STATUTES

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section I, Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Conn. Gen. Stat. Sec. 53-7. Effect of intoxication

Intoxication shall not be a defense to a criminal charge, but in any prosecution for an offense evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negate an element of the crime charged, provided when recklessness or criminal negligence is an element of the crime charge, if the actor, due to self-induced intoxication, is unaware of or disregards or fails to perceive a risk which he

would have been aware of had he not been intoxicated, such unawareness, disregard or failure to perceive shall be immaterial. As used in this section, "intoxication" means a substantial disturbance of mental or physical capacities resulting from the introduction of substances into the body.

Conn. Gen. Stat. Sec. 53a-8. Criminal liability for acts of another

(a) A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offence shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

(b) A person who sells, delivers or provides any firearm, as defined in subdivision (19) of section 53a-3, to another person to engage in conduct which constitutes an offense knowing or under circumstances in which he should know that such other person intends to use such firearm in such conduct shall be criminally liable for such conduct and shall be prosecuted and punished as if he were the principal offender.

Conn. Gen. Stat. Sec. 53a-54a. Murder

(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there

was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a) of this section, on the question of whether the defendant acted with intent to cause the death of another person.

(c) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony or murder under section 53a-54d.

Conn. Gen. Stat. Sec. 53a-155. Tampering with or fabricating physical evidence: Class D felony.

(a) A person is guilty of tampering with or fabricating physical evidence if, believing that an official proceeding is pending, or about to be instituted, he: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding; or (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such official proceeding.

(c) Tampering with or fabricating physical evidence is a class D felony.

28 USC § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 USC § 2254 (d) & (e). State custody; remedies in Federal Courts

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

The petitioner, Martyn D. Bruno, was the defendant in State of Connecticut vs. Martyn Bruno, Docket Number 91-73668 in the Superior Court for the Judicial District of Litchfield.

On June 23, 1993 after a trial a three judge panel found the petitioner guilty of murder in violation of Conn. Gen. Stat. §§ 53a-54a/53a-8 and three counts of tampering with physical evidence in violation of Conn. Gen. Stat. §§ 53a-155(a)(1)/53a-8. The Court (Pickett, J., Susco, J., Fineberg, J.) sentenced the petitioner to a total effective sentence of sixty (60) years on August 6, 1993.

Although the petitioner was tried by a panel of three judges, nothing in the record indicates that the petitioner knowingly, voluntarily, and intelligently waived his right to a jury trial.

Thereafter, the petitioner appealed his convictions to the Connecticut Supreme Court. On March 26, 1996 the Connecticut Supreme Court affirmed the judgment. State v. Bruno, 236 Conn. 514 (1996).

The petitioner filed a *pro se* petition for writ of *Habeas Corpus* in the Connecticut Superior Court on July 10, 1996 alleging ineffective assistance of counsel and filed an amendment to that petition on December 1, 1997 adding the allegations that his rights to a jury trial and a public trial had been violated.

The *pro se* petition and amended petitions one and two were supplanted by the third amended petition dated June 11, 2001 which alleged ineffective assistance of trial counsel in that trial counsel waived petitioner's right to a jury trial without the petitioner's consent; ineffective assistance of appellate counsel in that appellate counsel failed to present the issue of no jury waiver; and, the trial court violated his

right to due process by failing to canvass the petitioner as to his alleged waiver of the right to jury trial.

The *habeas* trial was held before the Honorable Richard Arnold, J., of the Connecticut Superior Court, on December 6, 2001 and December 10, 2001. In a memorandum of decision dated March 1, 2002, the Court dismissed the petition for writ of *habeas corpus*. The Appellate Court affirmed the judgment in a *per curium* decision dated February 4, 2003 at 74 Conn. App. 910.

At the State *habeas* trial, the petitioner testified, *inter alia*,: that he did not understand the meaning of the term "court trial" (T. 12/6 101 p. 7,8). When he came to an understanding of it through discussions with others with whom he was incarcerated, he told his attorneys he wanted a trial by jury and was told that it was "too late" (T. 12/6 101 p.9); Petitioner's appellate counsel did not discuss potential appellate issues with him or meet with him; and never conversed with the petitioner even though the petitioner had written to him stating that additional issues needed to be discussed and presented (T. 12/6 101 p. 11, 12). He would have elected a jury trial (T. 12/6 101 p. 15).

An attorney testified as a legal expert on behalf of the petitioner and opined it was possible a person could be tried by a three judge panel without his assent due to mistake or omission and a person might never know he had any other option (T. 12/6 101 p. 53, 54).

Among the exhibits introduced by the Respondent was Exhibit A, a copy of the Appellate Record in State v. Bruno, SC 14851 which included, *inter alia*, the judgment file and criminal docket sheet. The Judgment file states the petitioner pled not guilty and elected to be tried by the court on September 18, 1991 and restates on October 7, 1991 that the petitioner pled not guilty and elected a court trial. However, the court docket sheet of October 7, 1991, only indicates *pro forma* not guilty pleas and a jury election were

entered by the defendant. No mention is made therein that the petitioner in fact waived his right to a jury trial.

Also, among the exhibits introduced by the petitioner was Exhibit 5, a copy of the transcript of the court proceedings on September 18, 1991 which clearly indicates the petitioner did not enter any pleas or elections on that day, but deferred such entry to a later date.

This Petition for *Writ of Habeas Corpus*, dated January 2, 2004, was filed by the petitioner in the United States District Court, District of Connecticut. By Ruling and Order dated September 29, 2006, the United States District Court, by the Honorable Robert N. Chatigny, denied the petitioner's Motion for Judgment and dismissed his Petition for *Writ of Habeas Corpus*. The Court further ordered that a Certificate of Appealability will not issue. Judgment pursuant to said Ruling and Order was entered on October 3, 2006.

On March 13, 2007, the United States Court of Appeals for the Second Circuit denied the petitioner's Motion for Certificate of Appealability and dismissed his appeal, ruling that he has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. Sec. 2253(c).

Petitioner seeks review of a judgment of a United State's Court of Appeals, such that the basis for federal jurisdiction in the court of first instance, the United States District Court for the District of Connecticut, is 28 U.S.C. Sec. 2254.

ARGUMENT AS TO THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The petitioner, Martyn Bruno, applied for a Certificate of Appealability from the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. Sec. 2253(c) on the following specific issues constituting denial of his constitutional rights: (1) Trial counsels' waiver of

petitioner's right to a jury trial without his consent in violation his Sixth Amendment right to effective assistance of counsel; (2) Petitioner's appellate counsel's failure to challenge the lack of a proper jury waiver in violation of his Sixth Amendment right to effective assistance of counsel; (3) The trial court's refusal to review *in camera* the school and psychiatric records of the state's two chief witnesses violated the petitioner's rights to confrontation, compulsory process and due process under the Fifth, Sixth and Fourteenth Amendments; and (4) Evidence on the element of intent was insufficient to support the murder conviction in violation of the due process guarantee of the Fourteenth Amendment.

I. STANDARD OF REVIEW

Congress mandates that a prisoner, such as the petitioner, seeking post-conviction relief under 28 U.S.C. Sec. 2254 has no automatic right to appeal a district court's denial or dismissal of the petition for a writ of *habeas corpus*. Instead, the petitioner must first seek and obtain a certificate of appealability from the Court of Appeals pursuant to 28 U.S.C. Sec. 2253(c), which provides:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a *habeas corpus* proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the petitioner has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

In Miller-El v. Cockrell, 537 U.S. 322 (2003), this Court reviewed the denial of a certificate of appealability (COA) by the Court of Appeals for the Fifth Circuit. This Court reversed and remanded the denial of the COA, stating that when a *habeas* petitioner seeks a COA, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. E.g. Slack v. McDaniel, 829 U.S. 473, at 481 (2000). This inquiry does not require full consideration of the factual or legal bases supporting the claims. The prisoner need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. Sec. 2253 (c)(a). He satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case or that the issues presented were adequate to deserve encouragement to proceed further. E.g., id. at 484. He need not convince a judge, or, for that matter, three judges, that he will prevail, but must demonstrate that reasonable jurist would find the district court's assessment of the constitutional claims debatable or wrong, ibid.

Accordingly, a court of appeals should not side step this process by first deciding the merits of an appeal, and then justify its denial of a COA based on its adjudication of the actual merits, in essence deciding an appeal without jurisdiction. Thus, a COA does not require a showing that the appeal will succeed. Therefore, a court of appeals should not decline the application for a COA merely because it believes the petitioner will not demonstrate an entitlement to relief. Miller-El v. Cockrell, supra, at 336-37.

28 U.S.C. Sec. 2254(d) provides:

> (d) An application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

In regards to 28 U.S.C. Sec. 2254(d), this Court stated in Miller-El v. Cockrell, supra, at 342:

> The Court of Appeals, moreover, was incorrect for an even more fundamental reason. Before the issuance of a COA, the Court of Appeals has no jurisdiction to resolve the merits of petitioner's constitutional claims. (True, to the extent that the merits of this case will turn on the agreement or disagreement with a state court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply.) At the COA stage, however, a court need not make a definitive inquiry into this matter. As

> we have said, a COA determination is a separate proceeding, one distinct from the underlying merits. Slack, 529 U.S. at 481; Hohn, 524 U.S. at 241. The Court of Appeals should have inquired whether a "substantial showing of the denial of a constitutional right" had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

II. THE RIGHT TO JURY TRIAL

"The right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction."[1]

Since the right to trial is a fundamental right, the courts must indulge every reasonable presumption against waiver.[2] The Heyman court opined "waiver...should be based on nothing less than an affirmative representative by the party himself, or by his duly authorized counsel, on

---

[1] Duncan v. Louisiana, 391 U.S. 145 (1968)

[2] Heyman v. Kline, 456 F2d 123 (2nd Cir. 1972) quoting Aetna Insurance Co. v. Kennedy, 301 U.S. 389(1937)

representation to the court that the matter has been discussed with the client and that the client has determined not to exercise his right to a jury trial."[3] In Gargiulo v. Delsole[4] the Second Circuit reversed the findings of the district court that a waiver of a jury trial has been entered "...there was no such written or oral stipulation on the record."[5] In Tray-Wrap v. Six L'S Packing Co., Inc.,[6] the Second Circuit reversed the district court opinion which held that defendants had waived their right to a jury trial by failing to object to a scheduling notice, and by participating, without objection in the bench trial, although they had made a proper jury demand in their answer. The Court held "...the plaintiff's failure to object more strenuously to the bench trial did not constitute a waiver."[7] In conclusion, the court stated "...[t]he right to jury trial is too important...and the usual procedure for waiver of the right too clearly set out...for the courts to find a knowing and voluntarily relinquishment of the right in a doubtful situation."[8]

Similarly, in Dell'Orfano v. Romano,[9] the Court found "...Dell'Ofano's participation in the non-jury trial, without more, is insufficient to waive his right to raise that issue on appeal."[10]

III. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

To prevail on a Sixth Amendment claim of ineffective assistance of counsel, a defendant must satisfy the two-prong

---

[3] *Id.* at 128.
[4] 769 F.2d 77 (2nd Cir. 1985)
[5] *Id.* at 79
[6] 984 F.2d 65 (2nd Cir. 1993)
[7] *Id.* at 67.
[8] *Id.* at 67
[9] 962 F.2d 199 (2nd Cir. 1992)
[10] *Id.* at 202

test of Strickland v. Washington, 466 U.S. 688 (1984). Under this test,

> a defendant must first show that his counsel's performance was deficient and must then show that the deficiency caused actual prejudice to his defense. The deficiency prong is established by showing that the attorney's conduct fell "outside the wide range of professionally competent assistance." [Strickland, 466 U.S. at 690.] The prejudice prong is established by showing that there is a "reasonable probability" that, but for the deficiency, "the result of the proceeding would have been different." Id. at 694.
>
> * * * *
>
> In evaluating the evidence of whether an attorney's representation of a criminal defendant is deficient, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689; see Bloomer v. United States, 162 F.3d 187, 1923 (2nd Cir. 1998).

Clark v. Stinson, 214 F.3d 315, 321 (2d Cir. 2000).

Courts indulge a presumption that a criminal defendant has not waived fundamental rights guaranteed by the Sixth Amendment, including the right to jury trial and the right to counsel. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938). However, a defendant may waive these fundamental rights. Waiver requires "an intentional relinquishment or abandonment of a known right or privilege." Id. Whether a defendant has intelligently waived a fundamental right "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Id.

The petitioner claims that trial counsels' waiver of his right to a jury trial without his consent violated his Sixth Amendment right to effective assistance of counsel. Nothing in the record of the trial court indicates that petitioner knowingly, voluntarily and intelligently waived his right to a jury trial. In particular, the transcripts of the proceedings before the trial court do not indicate whether the trial court ever canvassed the petitioner concerning his alleged waiver of a jury trial.

At the state *habeas* hearing, petitioner's trial counsel contradicted the petitioner's claim that they waived a jury trial without his consent. The state *habeas* court rejected the petitioner's testimony as "not credible". The District Court relied on the state *habeas* court's adverse credibility finding, such that it held that petitioner's claim that his trial attorneys waived a jury trial without his consent "must be rejected as unfounded".

The lack of any indication on the record renders the question of jury waiver debatable, such that jurists of reason could disagree with the District Court's resolution of the petitioner's case or that the issues presented were adequate to deserve encouragement to proceed further. Reasonable jurists would find the District Court's assessment of this constitutional claim debatable or wrong. Miller-El v. Cockrell, supra.

IV. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In Evitts vs. Lucey, 469 U.S. 387 (1985), this Court held that a criminal defendant is entitled to the Sixth Amendment guarantee of effective representation of counsel on the first appeal as of right, and in Smith vs. Robbins, 528 U.S. 259 (2000), this Court held that the proper standard for

assessing the effectiveness of appellate counsel is that enunciated in Strickland v. Washington, supra.

The federal courts agree that counsel's failure to raise a specific issue on appeal is not the kind of attorney error which warrants application of the prejudice per se rule.

> In making such decisions, appellate counsel need not raise every colorable claim but may, instead, select the most promising issues for appeal. Jones v. Barnes, 463 U.S. 745, 752, 754 (1983). Nevertheless, when counsel fails to brief "significant and obvious" issues on appeal for no apparent reason, "while pursuing issues that were clearly and significantly weaker," the competence of counsel is called into question. Mayo v. Henderson, 13 F.2d 528, 533 (2nd Cir. 1994); accord Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). In Matire v. Wainwright, 811 F.2d 644, 646 (11th Cir 1987), for example, the Eleventh Circuit found ineffective assistance of counsel when appellate counsel ignored "a substantial, meritorious Fifth Amendment issue" that was "obvious on the record" and on which trial counsel had expressly objected. *Id.* at 1438.
>
> Bell v. Jarvis, 198 F.3d 432 (4th Cir. 1999)

The petitioner claims that his appellate counsel's failure to challenge the lack of a proper jury waiver violated his Sixth Amendment right to effective assistance of appellate counsel.

The District Court held that the claim that the appellate counsel failed to challenge the waiver of a jury trial by petitioner's trial counsel without petitioner's consent ("the illegal waiver") was clearly unavailing in light of the state *habeas* court's finding that petitioner did not tell his trial counsel that he wanted a jury trial. The District Court also rejected the claim concerning the appellate lawyer's failure to

challenge the lack of an on-the-record waiver of a jury trial by petitioner himself ("the lack of a proper waiver").

The District Court stated that this Court has never held that a criminal defendant has a constitutional right to an on-the-record colloquy with the court, or some other procedure, before a waiver of the right to a jury trial can be accepted. Nor has this Court held that the Constitution requires such a waiver to be in writing.[11] Moreover, the Second Circuit has stated that courts are not required to conduct a colloquy with a defendant waiving his right to a jury trial, although the Court recommended a colloquy to prevent challenges such as the one presently under discussion. See Marone v. United States, 10 F.3d 65, 67-68 (2d Cir. 1993) (stating that "the trial court must satisfy itself that the defendant has intelligently consented," but explaining that a colloquy is not constitutionally required.) Other Circuits are in agreement with this view. See United States v. Sammons, 918 F.2d 592, 597 (6th Cir. 1990) (colloquy not constitutionally required; defendant may attempt to show on *habeas* review that the waiver was not voluntarily, knowing, or intelligent); United States v. Chrans, 869 F.2d 1084, 1087-88 (7th Cir. 1989) (determination of whether there has been a valid waiver depends on the circumstances of each case).

Neither this Court nor any Circuit Court of Appeals has extended the strict Boykin requirement to the waiver of a jury trial.

The District Court found that a careful review of the record discloses affirmative evidence that the petitioner did waive his right to a jury trial: The transcript of the petitioner's trial shows that he was asked at the outset of the

---

[11] This Court has ruled that the Constitution requires an on-the-record canvass of a defendant before his guilty plea can be accepted. See Boykin v. Alabama, 395 U.S. 238 (1969).

trial whether he objected to the inclusion in the three-judge panel of the judge who has presided at his probable cause hearing and he said he did not. The District Court found it significant that if he did not waive his right to a jury trial, the Court's question gave him an opportunity to make that clear before the trial went forward. Further, the District Court also found it significant that if he did not waive his right to a jury trial, the Court's question gave him an opportunity to make that clear before the trial went forward. Further, the District Court also found it significant that the written decision of the trial court denying the motion for judgment of acquittal stated that petitioner "waived his right to a jury trial and elected to be tried by a three judge panel". See State v. Bruno, 1993 WL 280243, #1, No. 18-73668 (Conn. Supr. July 14, 1993). And the District Court also found it significant that petitioner's pro se *habeas* petition filed in state court made no claim concerning the waiver of his right to a jury trial, although it raised numerous other challenges concerning the conduct of his trial counsel.

Due to the alleged affirmative evidence of a waiver, the District Court held that "the burden is on the [petitioner] to prove that the waiver was not knowing and voluntary," citing Strozier v. Newsone, 871 F.2d 995, 998n.6 (11th Cir. 1989)(discussing the right to counsel) and United States v. DeRobertis, 715 F.2d 1174, 1178 (7th Cir. 1983). The District Court held that petitioner has not met this burden.

The above findings by the District Court are subject to questions as to their significance, such that jurists of reason could disagree with the District Court's resolution of the petitioner's case or that the issues presented were adequate to deserve encouragement to proceed further. Reasonable jurists would find the District Court's assessment of this constitutional claim debatable or wrong. Miller-El v. Cockrell, supra.

V. THE TRIAL COURT'S REFUSAL TO REVIEW IN CAMERA THE SCHOOL AND PSYCHIATRIC RECORDS OF THE STATE'S TWO CHIEF WITNESSES VIOLATED PETITIONER'S RIGHT TO DUE PROCESS UNDER THE U.S. CONSTITUTION, AMENDMENT 14.

Before trial, the petitioner moved for *in camera* review of the psychiatric and high school special education records of the State's two chief witnesses, Cara Ignacak and Briain Bingham, in order to obtain material relative to their abilities to accurately perceive, recall and relate the events at issue. App., M. Before cross-examining them, petitioner renewed his motion (T.1, p.118-120; T.2, p. 99). After voir dire of Ignacak; Bingham's father, Ian F. Bingham, Sr.; and S. Patricia Keener, Special Education Director at the high school Ignacak and Bingham attended, the Court ruled that petitioner did not make the preliminary showing needed to obtain in camera review and refused to inspect the records (T.1, p. 155; T.2, p. 123). The petitioner excepted (T.1, p. 155-56; T.2, p. 123).

1. The petitioner was precluded from making the factual showing needed for an *in camera* review of Ignacak's school and psychiatric records when the court prohibited him from pursuing pertinent lines of inquiry.

During *voir dire*, the petitioner tried to ask Ignacak and Keener how Ignacak's difficulty getting along with people manifested itself. The court prohibited such inquiry. T1, 123-25, 147-49. When the petitioner asked Keener if there was a diagnosis that led her to refer Ignacak to New Britain General's psychiatric unit, the court again barred

inquiry. T1, 136-37. These rulings were harmful because they squelched petitioner's efforts to make the required factual showing to obtain *in camera* review of Ignacak's school and psychiatric records.

2. The petitioner was prevented from making the required showing when the court refused to let Keener review Ignacak's records to refresh her recollection.

During the petitioner's voir dire of Keener, she repeatedly testified that she was unsure or did not remember or could not answer without referring to Ignacak's school records. When the petitioner sought to have her review the records to refresh her recollection, the Court refused to allow this, based on the statutory shield of confidentiality. T1, 142-44. This ruling violated the petitioner's federal constitutional right to due process because it precluded him from making the threshold showing required for *in camera* review of confidential records.

3. The petitioner made a factual showing sufficient to obtain an *in camera* review of Ignacak's and Bingham's school and psychiatric records.

To obtain an *in camera* review of confidential records, it must be shown that there is a "reasonable probability" they would contain information that the witnesses have infirmities, "at any pertinent time," that affected their testimonial capacity "in any respect." A court commits error in refusing to examine such records when a defendant makes this preliminary showing. Here, the court improperly refused to review *in camera* the school and

psychiatric records of Ignacak and Bingham after the petitioner made the necessary showing.

In Pennsylvania v. Ritchie, 410 U.S. 39(1987), the defendant, who was charged with sexually abusing his daughter, sought discovery from the state protective services agency seeking access to his daughter's records. This Court analyzed the case under the Due Process Clause, which requires the prosecution to disclose to an accused evidence in its possession that is favorable to him and material to guilt or punishment. See Brady v. Maryland, 373 U.S. 83, 87(1963). This Court ruled that the defendant had no due process right to conduct an unsupervised search of the state agency's confidential files, but was entitled to request specific material information. See Ritchie, 480 U.S. at 56-61. This Court stated that when confidential state files may contain material information, and the relevant state statute authorizes disclosure under court order, a court should review the files in camera and release to the defendant evidence deemed material. See id. Importantly, under Ritchie, a criminal defendant may not require a court to review confidential records in camera "without first establishing a basis for his claim that it contains material evidence." Id. at 58 n.15; see also United States v. Leung, 40 F.3d 577, 582-83 n.1 (2nd Cir. 1994) (citing Ritchie for the proposition that "in camera review should not be required unless defense establishes basis for claim that files contain material evidence"). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Ritchie, 480 U.S. at 57 (quoting United States vs.Bagley, 473 U.S. at 682, 685); see also United States v. Coppa, 267 F.3a 132, 140 (2d Cir. 2001).

The District Court held that petitioner has not shown that the Connecticut Supreme Court's affirmance of the trial

court's denial of in camera review is contrary to, or an unreasonable application of, Ritchie.

Whether the Connecticut Supreme Court followed the holding of Ritchie, based upon the facts of this case, is such that jurists of reason could disagree with the District Court's resolution of the petitioner's case or that the issues presented were adequate to deserve encouragement to proceed further. Reasonable jurists would find the District Court's assessment of this constitutional claim debatable or wrong. Miller-El v. Cookrell, supra.

VI EVIDENCE ON THE ELEMENT OF INTENT WAS INSUFFICIENT TO SUPPORT THE MURDER CONVICTION.

After judgment was rendered, the petitioner excepted and moved for judgment of acquittal and for a new trial on the ground that the State had failed to show sufficient evidence on the element of intent to commit murder. T6, 10; T10-A, 48; App., N, P.

A conviction based on less than proof beyond a reasonable doubt violates due process guarantees, In re Winship, 397 U.S. 358, 364 (1970); United States Constitution, Amendment 14, resulting in punishment not "clearly warranted by law."

A. The petitioner's mental capabilities were substantially impaired as a result of drug use and severe intoxication.

Despite overwhelming evidence of Mr. Bruno's sustained, heavy drinking and intoxication, the trial court failed to find that he was incapable of forming the intent to

commit murder. The petitioner testified having at least five "stiff" drinks of vodka and two 10 mg. Valium at the scene of the murder, T8, 53-54, 104-06, 111, in addition to the 15 to 16 cans of beer, 6 of them 16-ounce cans, and four, 10 mg Valium pills he consumed during the day. T8, 104-06.

Dr. Peter M. Zeman testified on behalf of the petitioner that when someone is in a blackout state, they can appear normal, alert and awake, and be talking to people around them, but later, when sober, will have no memory of the blackout period. T9, 11, 16-21. Zeman found that Mr. Bruno "was severely intoxicated from heavy and sustained use over the day of excessive and significant amounts of alcohol and Valium" that left him in a blackout state part of the night Rusinko died. T9, 16. A "major disturbance of mental function," blackout occurs when a person is severely intoxicated. It also can occur with the use of Valium, when enhances the debilitating effect. T9, 11, 16-18, 20.

Given Zeman's lucid explanation and the voluminous testimony of the State's own witnesses about Mr. Bruno's excessive drinking and intoxication, it was not reasonable to believe he was not severely debilitated.

The District Court's review of petitioner's challenge to the sufficiency of the evidence required the Court to determine whether the evidence, viewed fully and most favorably to the prosecution, would permit a rational trier of fact to find this essential element beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, at 319 (1979); Wheel v. Robinson, 34 F.3d 60, 66 (2nd Cir. 1994).

Intoxication is relevant to negate specific intent. State of Connecticut v. Austin, 244 Conn. 266, 239 (1998); see also Conn. Gen. Stat. Sec. 53a-7.

"Intoxication, however, does not automatically negate intent...It is for the [fact finder] to decide, after weighing all the evidence adduced at trial, whether a criminal defendant's intoxication rendered him incapable of forming the intent

required to commit the crime with which he is charged." State of Connecticut v. Downey, 45 Conn. App. 148, 156-57 (1997).

The three-judge court concluded that petitioner was "not so intoxicated by alcohol and/or drugs at the time of the murder that he was incapable of forming a rational intent or of controlling his will." Bruno, 236 Conn. at 545 (quoting trial court's memorandum of decision). The District Court held that petitioner has presented no clear and convincing evidence to rebut the trial court's finding, citing 28 U.S.C. Sec. 2254(e)(1).

The severe intoxication of the petitioner renders the question of intent debatable, such that jurists of reason could disagree with the District Court's resolution of the petitioner's case or that the issues presented were adequate to deserve encouragement to proceed further. Reasonable jurists would find the District Court's assessment of this constitutional claim debatable or wrong. Miller-El v. Cockrell, supra.

CONCLUSION

For the reasons above set forth, the petitioner, Martyn D. Bruno, respectfully requests that this Court grant his Petition for Writ of *Certiorari*.

Respectfully Submitted,
THE PETITIONER,
MARTYN D. BRUNO

By _____

Brian J. Woolf, Esq.
50 Founders Plaza
East Hartford, CT 06108
Tel. No. (860) 290-8690
Fax No. (860) 290-8697
His Attorney
Counsel of Record for the Petitioner

DOCKET NO.:

IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA

MARTYN D. BRUNO,
PETITIONER

v.

CONNECTICUT COMMISIONER OF CORECTION AND RICHARD BLUMENTHAL,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

APPENDIX

BRIAN J. WOOLF, ESQ.
COUNSEL OF RECORD FOR THE PETITIONER
50 FOUNDERS PLAZA
EAST HARTFORD, CT 06108
TEL. NO. (860) 290-8690

TABLE OF CONTENTS TO THE APPENDIX

1. Order of the United States Court of Appeals for the Second Circuit dated March 13, 2007.....II

2. Judgment of the United States District Court for the District of Connecticut dated October 3, 2006.....IV

3. Ruling and Order of the United States District Court for the District of Connecticut (Hon. Robert N. Chatigny, U.S.D.J.) dated September 29, 2006.....1

D. Conn. (New Haven)
04-cv-101
Chatigny, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, at 500 Pearl Street, in the City of New York, on the 13th day of March two thousand seven,

Present:

Hon. Joseph M. McLaughlin
Hon. Richard C. Wesley,
Circuit Judges,
Hon. William K. Sessions, III,*
District Judge.

Martyn D. Bruno,
Petitioner-Appellant,

v. 06-5026-pr

Connecticut Commissioner of Corrections,
Connecticut State's Attorney,
Respondents-Appellees.

Appellant, through counsel, moves for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is DENIED and the appeal is DISMISSESD, because Appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c).

FOR THE COURT
Thomas, Asreen, Acting Clerk

By: /s/

March 13, 2007

*The Honorable William K. Sessions, III, Chief Judge, of the United States District Court for the District of Vermont, sitting by designation.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARTYN D. BRUNO, Petitioner,	:	
v.	:	: CASE NO. 3:04CV101 (RNC)
CONNECTICUT COMMISSIONER OF CORRECTIONS and CONNECTICUT :STATE'S ATTORNEY, RICHARD BLUMENTHAL, Respondents.	:	

JUDGMENT

This action was commenced by the petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and was assigned to the Honorable Robert N. Chatigny, United States District Judge.

The Court having considered the full record of the case, including all applicable principles of law, and having filed its Ruling and Order denying the petitioner's motion for judgment and dismissing the petition; it is hereby

ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered dismissing the petition for a writ of habeas corpus.

Dated at Hartford, Connecticut, this 3rd day of October, 2006.

KEVIN F. ROWE,
Clerk

By _____
Jo-Ann Walker
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARTYN BRUNO,	:	
Petitioner,	:	
	: CASE NO.	
	V.	:3:04-CV-101(RNC)
CONNECTICUT	:	
COMMISSIONER	:	
OF CORRECTION,	:	
ET AL.,	:	
Respondents.	:	

RULING AND ORDER

Petitioner Martyn Bruno, a Connecticut inmate, was convicted after a bench trial of murder and tampering with physical evidence and sentenced to prison for sixty years. He brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

All the claims in the petition have previously been rejected in state court. The matter is now before this court on petitioner's motion for judgment. Petitioner has not shown that he is entitled to relief. Accordingly, his motion for judgment is denied and the petition is dismissed.

Background
Petitioner was charged with the murder of David Rusinko, who was killed in an isolated cabin in New Hartford, where he had been "partying" with petitioner and two others, Brian Bingham and
Cara Ignacak. After retaining counsel, petitioner waived a jury trial and elected to be tried by a three-judge panel. At the trial, Bingham and Ignacak testified that petitioner savagely

beat Rusinko, slit his throat, and burned his corpse in the cabin's fireplace. Petitioner admitted being present when Rusinko was killed but denied taking part in the killing.

After the three-judge panel found petitioner guilty of murdering Rusinko, he moved for a judgment of acquittal, contending that the evidence was insufficient to prove beyond a reasonable doubt that he intended to take Rusinko's life. He also moved for a new trial, contending that the court had improperly denied his request for access to Bingham's and Ignacak's confidential psychiatric records, which he had subpoenaed for purposes of cross-examination. Petitioner's post-trial motion was denied in its entirety. See State v. Bruno, Case No. 18-73668, 1993 WL 280243,*2 (Conn. Super. July 14, 1993). In rejecting the challenge to the sufficiency of the evidence, the court relied on the vicious nature of the crime, the testimony of Bingham and Ignacak concerning petitioner's words and actions on the day of the murder (and later in connection with an attempted cover-up); and the testimony of petitioner himself, whose credibility the court found to be "deficient" (partly because "his recollection appeared intentionally vague and inconsistent"). The challenge to the court's handling of the request for the psychiatric records was rejected because the request had not been supported by a showing of a reasonable probability that the records would reveal information "especially probative of the witness[es]' ability to comprehend, know or correctly relate the truth." Id. (citing State v. D'Ambrosio, 212 Conn. 50, 58-59 (1989)).

Petitioner appealed directly to the Connecticut Supreme Court, which rejected his claims on the merits and affirmed the judgment of conviction. See State v. Bruno, 236 Conn. 514 (1996).

Petitioner then sought a writ of habeas corpus in Connecticut Superior Court. The original petition, apparently prepared by petitioner himself, vigorously attacked the representation provided by his trial counsel but raised no claim concerning the validity of his waiver of a jury trial. After counsel appeared for petitioner in the habeas proceeding, however, the petition was amended to add the following new claims: first, that petitioner's trial counsel waived his right to a jury trial without his consent in violation of his Sixth Amendment right to effective assistance of counsel; second, that petitioner's appellate counsel was ineffective in failing to challenge the lack of a proper jury waiver; and third, that the trial court failed to conduct a canvass concerning the validity of the jury waiver in violation of petitioner's Fourteenth Amendment right to due process.

The state habeas court conducted an evidentiary hearing on their testimony concerning these meetings was corroborated by the testimony of a private investigator who attended the meetings as a member of the defense team. See id. 12/6/01 at 32-33. these new claims. Petitioner testified that he initially went along with his lawyers' recommendation that he elect to have a court trial on the mistaken assumption that a jury would be impaneled. He further testified that when he became aware of his istake in this regard several weeks later (after speaking with others in jail), he promptly told his attorneys he wanted a jury trial, but they told him it was too late to change his election of a court trial. Resp. App. N at 7-9.

Petitioner's testimony at the evidentiary hearing was contradicted by both of the lawyers who represented him in the criminal case. They testified that they met with him at least five times before the bench trial, advised him to elect to be tried by a three-judge panel, obtained his agreement, and were not told then or later that he really wanted a jury trial. Resp. App. N 12/6/01 at 25-28; 12/10/01 at 5-9.1 In addition,

they testified that they recalled petitioner being canvassed by a judge concerning his jury waiver.

Following the evidentiary hearing, the state habeas court rejected petitioner's claims in a written ruling. See Bruno v. Tarascio, No. CV 98416581S, 2002 WL 450591 (Ct. Super. March 1, 2002). Crediting the testimony of petitioner's lawyers, the court found that petitioner was "fully apprised of his right to a jury trial and the option of a court trial before a three-judge panel." Petitioner's testimony that he told his lawyers he wanted a jury trial was found to be "not credible." The ineffective assistance of appellate counsel claim was rejected because petitioner failed to establish that his counsel's performance was deficient or that any alleged deficiency resulted in actual prejudice to the defense. See id. at *6. The due process failure-to-canvass claim was ruled to be procedurally barred because the alleged lack of a canvass had not been objected to in the trial court, or challenged on the direct appeal, and petitioner had failed to demonstrate cause for these procedural defaults or actual prejudice resulting from the alleged error. Id.
The state habeas court's decision was affirmed without opinion by the Connecticut Appellate Court. Bruno v. Commissioner of Correction, 74 Conn. App. 910 (2003). Leave to appeal to the Connecticut Supreme Court was denied. Bruno v. Commissioner of Correction, 271 Conn. 920 (2004).

Petitioner then brought this action. The petition reasserts the claims presented to the state habeas court concerning the jury waiver. In addition, it reasserts the claims presented to the Connecticut Supreme Court regarding the sufficiency of the evidence and the trial court's handling of the request for the psychiatric and school records of Bingham and Ignacak.

Discussion

A federal court may grant habeas relief to a state prisoner on a claim adjudicated on the merits in state court only when the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Federal law is "clearly established" if it is found in holdings of the Supreme Court at the time of the state court decision. Williams v. Taylor, 529 U.S. 362, 412 (2000). A decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that precedent]." Id. at 405. The court need not identify or be aware of the governing precedent so long as the court's reasoning and result do not contradict it. See Early v. Packer, 537 U.S. 3, 8 (2002). A state court decision is an unreasonable application of clearly established federal law "if the state court correctly identifies the governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the particular case." Bell v. Cone, 535 U.S. 685, 694 (2002).

This inquiry focuses "on whether the state court's application of clearly established federal law [was] objectively unreasonable."
Id. The state court's factual findings are entitled to a presumption of correctness, which can be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); see Majid v. Portuondo, 428 F.3d 112, 125 (2d Cir. 2005).

Claims that have not been adjudicated on the merits in state court due to a procedural default by the petitioner generally

do not provide a basis for federal habeas relief. To obtain relief on such a claim, the petitioner typically must show both cause to excuse the default and actual prejudice arising from the alleged violation of federal law on which the claim is based. See Coleman v. Thompson, 501 U.S. 722, 750 (1991). As discussed in detail below, petitioner has not made the showings required by these standards.

I. Ineffective Assistance of Counsel

To prevail on a Sixth Amendment claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668 (1984). Under this test, a defendant must first show that his counsel's performance was deficient and must
then show that the deficiency caused actual prejudice to his defense. The deficiency prong is established by showing that the attorney's conduct fell "outside the wide range of professionally competent assistance." [Strickland, 466 U.S. at 690].

The prejudice prong is established by showing that there is a "reasonable probability" that, but for the deficiency, "the result of the proceeding would have been different." Id. at 694.

* * * *

In evaluating the evidence of whether an attorney's representation of a criminal defendant is deficient, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689; see Bloomer v. United States, 162 F.3d 187, 1923 (2d Cir. 1998). Clark v. Stinson, 214 F.3d 315, 321 (2d Cir. 2000).

A. Trial Counsel

Petitioner claims that his trial counsel rendered ineffective assistance "in that [they] waived [his] right to a jury trial without [his] consent, violating his 6th and 14th Amendment rights . . . ." Pet.'s Motion for Judgment, ¶ 1. Courts indulge a presumption that a criminal defendant has not waived fundamental rights guaranteed by the Sixth Amendment, including the right to jury trial and the right to counsel. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938). However, a defendant may waive these fundamental rights. Waiver requires "an intentional relinquishment or abandonment of a known right or privilege." Id. Whether a defendant has intelligently waived a fundamental right "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Id.

There are two seminal cases on a criminal defendant's waiver of his right to a jury trial: Patton v. United States, 281 U.S. 276 (1930), and Adams v. United States ex rel. McCann, 317 U.S.
269 (1942). In Patton, a federal defendant consented in open court to trial by less than twelve jurors after one member of the jury had to be excused due to illness. 281 U.S. at 286. The Court held that a criminal defendant may waive his Sixth Amendment right to be tried by a jury of twelve. See id. at 290, 298. The Court stated that "before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." Id. at 312. The Court cautioned that "the duty of the trial court [to ensure that consent is express and intelligent] is not to be discharged as a mere matter of rote, but with sound and advised discretion . . . with a caution increasing in degree as the offenses dealt with increase in gravity." Id. at 312-13.

In Adams, a federal criminal defendant waived his right to trial by jury in writing while proceeding without the assistance of counsel. 317 U.S. at 270-71. The Court ruled that "an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury," even without the guidance of counsel. Id. at 275. The Court rejected a mechanical rule that would preclude a waiver except on the advice of counsel stating, "whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case." Id. at 277-78. Whether the defendant was represented by counsel is one circumstance to be considered. Id. at 277.

Petitioner's claim that his trial counsel rendered ineffective assistance by waiving a jury trial without his consent is based solely on his own testimony, which has been contradicted by the testimony of his lawyers. As noted earlier, he claims that he initially agreed to a court trial on the assumption that a jury would be impaneled and, when he learned he was mistaken, he promptly told his lawyers he wanted a jury trial but they told him it was too late. The state habeas court rejected petitioner<s testimony as "not credible." The state court's adverse credibility finding is amply supported by the testimony at the habeas hearing provided by petitioner's counsel, which the state court was clearly entitled to credit. Given the state court's adverse credibility finding, petitioner's claim that his trial lawyers waived a jury trial without his consent must be rejected as unfounded.

B. Appellate Counsel

Petitioner's claim that his appellate counsel was ineffective appears to be based on two distinct grounds: the appellate lawyer's failure to challenge the waiver of a jury The

Supreme Court has ruled that the Constitution requires an on-the-record canvass of a defendant before his guilty plea can be accepted. See Boykin v. Alabama, 395 U.S. 238 (1969).

Arguably, Boykin can be read to require a similar on-the-record canvass before a defendant can waive his right to a jury trial.
The Court noted that a guilty plea waives the right to a jury trial. 395 U.S. at 243. The Court also cited Carnley v. Cochran, 369 U.S. 506, 514-15 (1962), for the proposition that the record or other evidence must show that an accused intelligently and knowingly waived his right to counsel. Id. at 242. But neither the Supreme Court nor any Circuit Court of Appeals has extended the strict Boykin requirement to the waiver of a jury trial.

Trial by petitioner's trial counsel without petitioner's consent (which petitioner appears to refer to as "the illegal waiver"); and the lawyer's failure to challenge the lack of an on-the record waiver of a jury trial by petitioner himself (which petitioner refers to as "the lack of a proper waiver"). The first of these grounds is clearly unavailing in light of the state habeas court's finding that petitioner did not tell his trial counsel he wanted a jury trial. The second ground is unavailing for the reasons explained below.

The Supreme Court has never held that a criminal defendant has a constitutional right to an on-the-record colloquy with the court, or some other procedure, before a waiver of the right to a jury trial can be accepted. Nor has the Court held that the Constitution requires such a waiver to be in writing.2 Moreover, the Second Circuit has stated that courts are not required to conduct a colloquy with a defendant waiving his right to a jury trial, although the Court recommended a colloquy to prevent challenges such as the one presently

under discussion. See Marone v. United States, 10 F.3d 65, 67-68 (2d Cir. 1993) (stating that "the trial court must satisfy itself that the defendant has intelligently consented," but explaining that a colloquy is not constitutionally required). Other Circuits are in agreement with this view. See United States v. Sammons, 918
F.2d 592, 597 (6th Cir. 1990) (colloquy not constitutionally required; defendant may attempt to show on habeas review that the waiver was not voluntary, knowing, or intelligent); United States v. Chrans, 869 F.2d 1084, 1087-88 (7th Cir. 1989)(determination of whether there has been a valid waiver depends on the circumstances of each case, and the Constitution does not mandate "how long the judge's explanation must be" or that the waiver be in writing).

In addition, careful review of the record discloses affirmative evidence that petitioner did waive his right to a jury trial. On habeas review, the court may determine whether the defendant waived this right by examining not only the record generated in the course of the underlying criminal proceeding but other evidence as well. See Chrans, 869 F.2d at 1087-88(in collateral proceeding, record or independent evidence must indicate a valid jury waiver). The transcript of petitioner's trial shows that he was asked at the outset of the trial whether he objected to the inclusion in the three-judge panel of the judge who had presided at his probable cause hearing and he said he did not. If, as he now claims, he did not want to waive his right to a jury trial (and had not intended to do so), the court's question gave him an opportunity to make that clear before the trial went forward. His failure to object makes sense in light of the testimony given by his trial counsel at the habeas hearing that he knowingly and intentionally waived his right to a jury trial and was canvassed by a judge in open court before his waiver was accepted. The written decision of the trial court denying

the motion for judgment of acquittal is consistent with the lawyer's testimony; it states that petitioner "waived his right to a jury trial and elected to be tried by a three judge panel." See State v. Bruno, 1993 WL 280243,*1, No. 18-73668 (Conn. Super. July 14, 1993). Finally, as noted earlier, petitioner's pro se habeas petition filed in state court made no claim concerning the waiver of his right to a jury trial, although it raised numerous other challenges concerning the conduct of his trial counsel. Taking all this evidence into account, I have little doubt that petitioner waived his right to a jury trial.

As suggested by Adams, so long as there is affirmative evidence of a waiver, "the burden is on the [petitioner] to prove that the waiver was not knowing and voluntary." Strozier v. Newsome, 871 F.2d 995, 998 n.6 (11th Cir.1989) (discussing the right to counsel); see also United States v. DeRobertis, 715 F.2d 1174, 1178 (7th Cir. 1983). Petitioner has not met this burden.

II. Due Process

A. Failure to Canvass

Petitioner does not dispute the state habeas court's determination that his due process claim based on the trial court's alleged failure to canvass him concerning his jury waiver was procedurally defaulted in the trial court and on direct appeal. Accordingly, the claim cannot be considered on the merits unless petitioner demonstrates that the cause and prejudice test is satisfied. Under this test, "'cause' . . .must be something external to the petitioner, something that cannot be fairly attributed to him." Coleman v. Thompson, 501 U.S. 722, 753 (1991). "Attorney ignorance or inadvertence is not cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the

risk of attorney error.'" Id. (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986).

Petitioner has failed to demonstrate "cause" as thus defined. His memorandum of law seems to suggest that he should be permitted to litigate his claim on the merits because his trial lawyers wrongly told him he could not have a jury trial and his appellate lawyer never met with him to talk about potential issues for appeal. See Pet.'s Mem. At 11-12. As discussed above, however, petitioner's allegation that he told his lawyers he wanted a jury trial must be regarded as false (the state habeas court having so found with ample support in the record).

Moreover, it is undisputed that petitioner never raised the issue of the validity of the jury waiver with his appellate lawyer, although he did correspond with him concerning the appeal and thus had an adequate opportunity to do so. Because petitioner has failed to demonstrate cause as required by the cause and prejudice test, this due process claim cannot be considered on the merits.

B. Sufficiency of the Evidence

The Due Process Clause of the Fourteenth Amendment protects a defendant from being convicted of a crime in state court unless the prosecution proves every element of the offense charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). Petitioner claims that the evidence presented at his criminal trial is insufficient to prove that he intended to kill the victim, his friend Rusinko. Petitioner's challenge to the sufficiency of the evidence requires the court to determine whether the evidence, viewed fully and most favorably to the prosecution, would permit a rational trier of fact to find this essential element beyond a reasonable doubt. Jackson, 443 U.S. at 319; Wheel v. Robinson, 34 F.3d 60, 66

(2d Cir. 1994). This standard of review recognizes the fact finder's responsibility to resolve reasonable conflicts in testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. Jackson, 443 U.S. at 319. This court may not re-weigh evidence or redetermine witness credibility. Marshall v. Lonberger, 459 U.S. 422, 434 (1983) ("Title 28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the trial court, but not by them.").

Under Conn. Gen. Stat. § 53a-54a, the elements of murder are
"(1) intent, (2) causation and (3) death by killing as opposed to death by accident or suicide." Connecticut v. Rasmussen, 225 Conn. 55, 74 (1993). To prove the element of intent to kill, the State must prove beyond a reasonable doubt that the defendant caused the death of another "with the conscious objective to do so." Connecticut v. Patterson, 229 Conn. 328, 332-33 (1994) (citing Conn. Gen. Stat. §§ 53a-3(11) and 53a-54a). Intent to cause death may be inferred from the type of weapon used, the manner in which it was used, the nature and number of wounds inflicted, and events leading to and immediately following the death. Connecticut v. Sivri, 231 Conn. 115, 127 (1994).

Intoxication is relevant to negate specific intent. Connecticut v. Austin, 244 Conn. 226, 239 (1998); see also Conn. Gen. Stat. §
53a-7. "Intoxication, however, does not automatically negate intent. . . . It is for the [fact finder] to decide, after weighing all the evidence adduced at trial, whether a criminal defendant's intoxication rendered him incapable of forming the intent required to commit the crime with which he is charged."

Connecticut v. Downey, 45 Conn. App. 148, 156-57 (1997). The evidence presented at petitioner<s criminal trial would permit a rational trier of fact to find that he consciously intended to kill Rusinko, although he had been drinking and taking Valium that day. See Jackson v. Virginia, 443 U.S. 307, 325 (1979). Ignacak testified that when they arrived at the campsite, petitioner "stated that [Rusinko] had done some things to him in the past that angered him and he needed to pay . . .After talking about it more and getting more angry, there was mention of killing him." (Pet.'s Ex. A 14-16.) Bingham corroborated her testimony. He testified that petitioner was upset with Rusinko because of a problem with his "driver's license and something to do with a drug deal connection." (Pet.'s Ex. B 20.) Bingham testified that petitioner "said he would like to beat David Rusinko to death . . . . He said that [Rusinko] was the one who called his drug connection . . . Then he asked if we could somehow make a suggestion that we go up to the upper campsite because it was – that is where he wanted the crime to be done." (Pet.'s Ex. B 25.)

According to Ignacak, petitioner stated that shooting Rusinko would be "too good for him." (Pet.'s Ex. A 16.) Ignacak testified that petitioner subsequently beat Rusinko and "let out reasons" as he was kicking him, "like, 'This is for the DWI, this is for the cocaine, this is for the loss of my license.'" (Pet.<s Ex. A 31.) She testified that "after the first few times he whacked Rusinko, he just seemed like he sobered up," and that his coordination seemed fine." (Pet.'s Ex.
A 38-39, B 3.) Bingham testified that petitioner asked him for
a knife, which Bingham refused to provide; that petitioner then tried unsuccessfully to cut Rusinko's throat using a

pocket knife; and that petitioner then asked Ignacak for a piece of glass. (Pet.'s Ex. C 4, B 31.) According to Bingham, petitioner didn't like the piece of glass given to him, so he got another piece himself and once again tried to cut Rusinko's throat.

When asked if petitioner said anything during the assault, Bingham testified that petitioner said "his drug connection would not deal with him no more unless he took care of the problem"; that "he had a contract out on him for a week or two previous because of Dave"; and that "if he was to stop now, [Rusinko] would go to the police and would get in trouble anyways." (Pet.'sEx. B 30.)

Petitioner's account differs markedly. He testified that he saw Rusinko fall to the floor, looked down and said something like "Oh, man, is he unconscious or is he breathing." He as he did before the Connecticut Supreme Court, petitioner argues that the evidence adduced at trial was consistent with the conclusion that Bingham and Ignacak murdered Rusinko, and because the state did not sufficiently refute this hypothesis . . . a reasonable fact finder could not have found the defendant guilty testified that he didn't remember anything after that until he woke up, looked for his drink, and saw Rusinko's body in the fire. He testified extensively about his drug and alcohol use that day, and presented expert testimony that he was in a state of blackout at the time of the killing as a result of severe intoxication. Petitioner admitted that after Rusinko was dead, he helped dispose of the body, shoveling the remains into a bag and disposing of the ashes in an outhouse, and that he helped conceal evidence of the crime, including painting over blood stains and disassembling and burying Rusinko's bicycle. He also admitted participating in a subsequent search to find Rusinko. The three-judge court concluded that petitioner was "not so intoxicated by alcohol

and/or drugs at the time of the murder that he was incapable of forming a rational intent or of controlling his will." Bruno, 236 Conn. at 545 (quoting trial court's memorandum of decision). This finding is more than adequately supported by the testimony of Bingham and Ignacak. It is also supported by the testimony of an expert psychiatric witness called by the State. Petitioner has presented no clear and convincing evidence to rebut the trial court's finding. 28 U.S.C. § 2254(e)(1). "beyond a reasonable doubt." Bruno, 236 Conn. at 545. The Supreme Court has specifically rejected the theory that the evidence offered in support of a conviction must rule out every hypothesis except that of guilt beyond a reasonable doubt.

Rather, "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson, 443 U.S. at 326.

III. Denial of Access To Records

Before and during his criminal trial, petitioner moved for disclosure and in camera examination of psychiatric records and school records pertaining to Bingham's and Ignacak's abilities to perceive, recall, and relate events. (See Resp.'s Ex. B at 15-18.) Under Connecticut law, psychiatric records are privileged and cannot be discovered, even pursuant to court order, without the consent of the holder of the privilege. See Conn. Gen. Stat. §§ 52-146d, 52-146e. Connecticut law permits disclosure of school records pursuant to court order on a showing that the records are relevant to the case or the witness<s credibility.

See Conn. Gen. Stat. § 10-15b(b); State v. James, 211 Conn. 555, 579 & n.10 (1989). The court denied petitioner<s request for in camera review, finding that he had failed to provide a sufficient foundation. The Connecticut Supreme Court affirmed this ruling. State v. Bruno, 236 Conn. 514, 521-37 (1996).

Petitioner's claim before this court is that the denial of in camera review violated his constitutional rights to a plurality of the Court in Ritchie rejected the Confrontation Clause claim, stating that this Clause confers a trial right "designed to prevent improper restrictions on the types of questions that defense counsel may ask during crossexamination," id. at 52, and "does not compel the pretrial production of information that might be useful in preparing for trial." Id. at 53 n.9. A majority declined to examine the claim confrontation, compulsory process, and due process. The Supreme Court considered a similar claim in Pennsylvania v. Ritchie, 480
U.S. 39 (1987). In that case, the defendant was charged with sexually abusing his daughter. During pretrial discovery, he served a subpoena on the state protective services agency seeking access to his daughter's records, which contained a file relating to the charges against him and a report on a previous allegation of abuse. The state refused to comply on the ground that the records were privileged under state law; however, the relevant state statute allowed disclosure "to a court of competent jurisdiction pursuant to a court order." Id. at 43. The state court declined to order disclosure of the records and did not review them in camera. On appeal, the Pennsylvania Supreme Court held that the Confrontation and Compulsory Process Clauses gave the defendant a right to examine the records.

The Supreme Court analyzed the case under the Due Process

Clause, which requires the prosecution to disclose to an accused evidence in its possession that is favorable to him and material to guilt or punishment. See Brady v. Maryland, 373 U.S. 83, 87
(1963).4 The Court ruled that the defendant had no due process under the Compulsory Process Clause, stating, "This Court has never squarely held that the Compulsory Process Clause guarantees the right . . . to require the government to produce exculpatory evidence." Id. at 56. In view of these aspects of Ritchie, petitioner's claims based on these Clauses also are unavailing, right to conduct an unsupervised search of the state agency's confidential files, but was entitled to request specific material information. See Ritchie, 480 U.S. at 59-61. The Court stated that when confidential state files may contain material information, and the relevant state statute authorizes disclosure under court order, a court should review the files in camera and release to the defendant evidence deemed material. See id.

Importantly, under Ritchie, a criminal defendant may not require a court to review confidential records in camera "without first establishing a basis for his claim that it contains material evidence." Id. at 58 n.15; see also United States v. Leung, 40 F.3d 577, 582-83 n.1 (2d Cir. 1994) (citing Ritchie for the proposition that "in camera review should not be required unless defense establishes basis for claim that files contain material evidence"). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Ritchie, 480 U.S. at 57 (quoting Bagley, 473 U.S. at 682, 685); see also United States v. Coppa, 267 F.3d 132, 140 (2d Cir. 2001) ("[T]he scope of the government's constitutional duty – and, concomitantly, the scope of a defendant's constitutional right is ultimately defined retrospectively, by reference to the

likely effect that the suppression of particular evidence had on the outcome of the trial."). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Ritchie, 480 U.S. at 57 (quoting Bagley, 473 U.S. at 682, 685).

"Mere speculation that a government file may contain Brady material is not sufficient to require a remand for in camera inspection, much less reversal for a new trial." United States v. Pou, 953 F.2d 363, 366-67 (8th Cir. 1992) (quoting United States v. Navarro, 737 F.2d 625, 631 (7th Cir. 1984)). Petitioner has not shown that the Connecticut Supreme Court's
affirmance of the trial court's denial of in camera review is contrary to, or an unreasonable application of, Ritchie.

According to petitioner's motion for disclosure, he sought the records to impeach the witnesses' "ability to accurately and honestly relate information." (Resp.'s Ex. B at 16-17.) Under Ritchie, for petitioner to have a constitutional right to review of the records, he had to establish some basis for his claim that the records were relevant to the witnesses' ability to relate information to a material extent.

Petitioner showed that Bingham had substance abuse problems for which he received psychiatric treatment. (Pet.'s Ex. B 36-37.) Bingham's father described him as "troubled" and "sick" (Pet.'s Ex. B 35) and a special education administrator, S. Patricia Keener, described him as "social[ly] and emotional[ly] maladjusted" (Pet.'s Ex. B 42). Petitioner contends that, because of the central role of alcohol in the events surrounding the murder, and because Bingham lied about the murder following the event, it was "reasonable to believe his records could have obtained impeachment information relative to his abilities to accurately perceive,

recall and relate the events at issue." (Doc. #25 at 25.) It may be the records contained some useful information in general, but petitioner failed to show that they were material on the issue of Bingham's testimonial capacity. Moreover, petitioner was free to ask Bingham on cross-examination about his alcohol consumption on that night and in general. Cf. Davis v. Litscher, 290 F.3d 943, 947 (7th Cir. 2002) (rejecting a similar habeas claim because, among other reasons, petitioner could have cross-examined the victim on her use of cocaine on the night of the events in question). He also could have impeached Bingham with the false statements he made after the murder. Because these lines of impeachment were available, and because petitioner made no showing that Bingham's emotional problems might have affected his testimonial capacity, it is not reasonably probable that disclosure of Bingham's school and psychiatric records would have changed the outcome of the trial.

Turning to Ignacak, petitioner showed that she had problems recalling things at school (Pet.'s Ex. A 42) and had interpersonal problems (Pet.'s Ex. A 46). Ignacak testified that her memory problem was "not that bad" (Pet.'s Ex. A 50), and Keener testified that Ignacak "didn't really have any memory problems, or associative problems, or organizational problems." (Pet.'s Ex. A 64). In light of this, the court could reasonably conclude that Ignacak's problems at school would have no bearing on her general testimonial capacity. In addition, petitioner has yet to articulate how Ignacak's interpersonal problems would have affected her testimonial capacity in a material way, other than to speculate that she might have been hostile or irrational toward others. Cf. Davis, 290 F.3d at 947 (noting that the petitioner "only argued to the state court that [the witness] was depressed, not delusional, and nothing in the record indicate[d] that her depression would cause her to misperceive reality").

In the alternative, petitioner argues that the trial court prevented him from laying a foundation for in camera review by cutting-off questions concerning Ignacak's interpersonal difficulties and by refusing to permit him to refresh Keener's recollection by referring to Ignacak's school records. The Connecticut Supreme Court concluded that petitioner's inquiries concerning Ignacak<s interpersonal difficulties were not appropriately tailored to elicit information relevant to the issue for which the offer was made," which was "Ignacak's capacity accurately to perceive, recall and relate events. "Bruno, 236 Conn. at 533. With regard to the argument that petitioner should have been permitted to use Ignacak's special education records to refresh Keener<s recollection, the Court held that, in certain circumstances, a court should allow a witness access to a confidential document (assuming that witness has the authority to review it) without disclosure to counsel. Bruno, 236 Conn. at 536. In deciding whether to allow such review, the court should consider "the nature of the information sought" and "whether the witness whose memory the defendant seeks to refresh is the only person who feasibly could provide the information sought." Id. After articulating this standard, the Court found no abuse of discretion in the trial court<s denial of petitioner's request to use the special education records to refresh Keener's memory. Id.

Petitioner has not demonstrated that the Connecticut Supreme Court's decision is contrary to, or an unreasonable application of, clearly established federal law. Even assuming the barred line of inquiry concerning Ignacak's interpersonal problems would have revealed that she was often hostile to others, this would not have called into question her testimonial capacity to such a degree that petitioner can be said to have received an unfair trial. And the court's refusal to permit petitioner to refresh Keener's recollection did not

materially prejudice him because he could have obtained the desired information in other ways, such as from Ignacak, who had already provided some details of her treatment on voir dire.

CONCLUSION
Accordingly, petitioner's motion for judgment (Doc. 24) is denied, and his application for a writ of habeas corpus is dismissed. His motion for an evidentiary hearing (Doc. # 21) is denied as moot. A certificate of appealability will not issue. The Clerk may close the file. So ordered this 29th day of September 2006.

_____/s/_____
Robert N. Chatigny
United States District Judge
28RULING AND ORDER
Petitioner Martyn Bruno, a Connecticut inmate, was convicted after a bench trial of murder and tampering with physical evidence and sentenced to prison for sixty years. He brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

All the claims in the petition have previously been rejected in state court. The matter is now before this court on petitioner's motion for judgment. Petitioner has not shown that he is entitled to relief. Accordingly, his motion for judgment is denied and the petition is dismissed.

Background
Petitioner was charged with the murder of David Rusinko, who was killed in an isolated cabin in New Hartford, where he had been "partying" with petitioner and two others, Brian Bingham and

Cara Ignacak. After retaining counsel, petitioner waived a jury trial and elected to be tried by a three-judge panel. At the trial, Bingham and Ignacak testified that petitioner savagely beat Rusinko, slit his throat, and burned his corpse in the cabin's fireplace. Petitioner admitted being present when Rusinko was killed but denied taking part in the killing.

After the three-judge panel found petitioner guilty of murdering Rusinko, he moved for a judgment of acquittal, contending that the evidence was insufficient to prove beyond a reasonable doubt that he intended to take Rusinko's life. He also moved for a new trial, contending that the court had improperly denied his request for access to Bingham's and Ignacak's confidential psychiatric records, which he had subpoenaed for purposes of cross-examination.
Petitioner's post-trial motion was denied in its entirety.
See State v. Bruno, Case No. 18-73668, 1993 WL 280243,*2 (Conn.
Super. July 14, 1993). In rejecting the challenge to the sufficiency of the evidence, the court relied on the vicious nature of the crime, the testimony of Bingham and Ignacak concerning petitioner's words and actions on the day of the murder (and later in connection with an attempted cover-up); and the testimony of petitioner himself, whose credibility the court found to be "deficient" (partly because "his recollection appeared intentionally vague and inconsistent"). The challenge to the court's handling of the request for the psychiatric records was rejected because the request had not been supported by a showing of a reasonable probability that the records would reveal information "especially probative of the witness[es]' ability to comprehend, know or correctly relate the truth." Id. (citing State v. D'Ambrosio, 212 Conn. 50, 58-59 (1989)).

Petitioner appealed directly to the Connecticut Supreme

Court, which rejected his claims on the merits and affirmed the judgment of conviction. See State v. Bruno, 236 Conn. 514
(1996).

Petitioner then sought a writ of habeas corpus in Connecticut Superior Court. The original petition, apparently prepared by petitioner himself, vigorously attacked the representation provided by his trial counsel but raised no claim concerning the validity of his waiver of a jury trial. After counsel appeared for petitioner in the habeas proceeding, however, the petition was amended to add the following new claims: first, that petitioner's trial counsel waived his right to a jury trial without his consent in violation of his Sixth Amendment right to effective assistance of counsel; second, that petitioner's appellate counsel was ineffective in failing to challenge the lack of a proper jury waiver; and third, that the trial court failed to conduct a canvass concerning the validity of the jury waiver in violation of petitioner's Fourteenth Amendment right to due process.
The state habeas court conducted an evidentiary hearing on their testimony concerning these meetings was corroborated by the testimony of a private investigator who attended the meetings as a member of the defense team. See id. 12/6/01 at 32-33.

Petitioner testified that he initially went along with his lawyers' recommendation that he elect to have a court trial on the mistaken assumption that a jury would be impaneled. He further testified that when he became aware of his mistake in this regard several weeks later (after speaking with others in jail), he promptly told his attorneys he wanted a jury trial, but they told him it was too late to change his election of a court trial. Resp. App. N at 7-9. Petitioner's testimony at the evidentiary hearing was contradicted by both of the

lawyers who represented him in the criminal case. They testified that they met with him at least five times before the bench trial, advised him to elect to be tried by a three-judge panel, obtained his agreement, and were not told then or later that he really wanted a jury trial. Resp. App. N 12/6/01 at 25-28; 12/10/01 at 5-9.1 In addition, they testified that they recalled petitioner being canvassed by a judge concerning his jury waiver.

Following the evidentiary hearing, the state habeas court rejected petitioner's claims in a written ruling. See Bruno v. Tarascio, No. CV 98416581S, 2002 WL 450591 (Ct. Super. March 1, 2002). Crediting the testimony of petitioner's lawyers, the court found that petitioner was "fully apprised of his right to a jury trial and the option of a court trial before a three-judge panel." Petitioner's testimony that he told his lawyers he wanted a jury trial was found to be "not credible." The ineffective assistance of appellate counsel claim was rejected because petitioner failed to establish that his counsel's performance was deficient or that any alleged deficiency resulted in actual prejudice to the defense. See id. at *6. The due process failure-to-canvass claim was ruled to be procedurally barred because the alleged lack of a canvass had not been objected to in the trial court, or challenged on the direct appeal, and petitioner had failed to demonstrate cause for these procedural defaults or actual prejudice resulting from the alleged error. Id.

The state habeas court's decision was affirmed without opinion by the Connecticut Appellate Court. Bruno v. Commissioner of Correction, 74 Conn. App. 910 (2003). Leave to appeal to the Connecticut Supreme Court was denied. Bruno v. Commissioner of Correction, 271 Conn. 920 (2004).

Petitioner then brought this action. The petition reasserts the claims presented to the state habeas court concerning the jury waiver. In addition, it reasserts the claims presented to the Connecticut Supreme Court regarding the sufficiency of the evidence and the trial court's handling of the request for the psychiatric and school records of Bingham and Ignacak.

Discussion

A federal court may grant habeas relief to a state prisoner on a claim adjudicated on the merits in state court only when the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Federal law is "clearly established" if it is found in holdings of the Supreme Court at the time of the state court decision. Williams v. Taylor, 529 U.S. 362, 412 (2000). A decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that precedent]." Id. at 405. The court need not identify or be aware of the governing precedent so long as the court's reasoning and result do not contradict it. See Early v. Packer, 537 U.S. 3, 8 (2002). A state court decision is an unreasonable application of clearly established federal law "if the state court correctly identifies the governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the particular case." Bell v. Cone, 535 U.S. 685, 694 (2002).

This inquiry focuses "on whether the state court's application of clearly established federal law [was] objectively unreasonable."

Id. The state court's factual findings are entitled to a presumption of correctness, which can be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); see Majid v. Portuondo, 428 F.3d 112, 125 (2d Cir. 2005). Claims that have not been adjudicated on the merits in state court due to a procedural default by the petitioner generally do not provide a basis for federal habeas relief. To obtain relief on such a claim, the petitioner typically must show both cause to excuse the default and actual prejudice arising from the alleged violation of federal law on which the claim is based. See Coleman v. Thompson, 501 U.S. 722, 750 (1991). As discussed in detail below, petitioner has not made the showings required by these standards.

I. Ineffective Assistance of Counsel

To prevail on a Sixth Amendment claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668 (1984). Under this test, a defendant must first show that his counsel's performance was deficient and must then show that the deficiency caused actual prejudice to his defense. The deficiency prong is established by showing that the attorney's conduct fell "outside the wide range of professionally competent assistance." [Strickland, 466 U.S. at 690].

The prejudice prong is established by showing that there is a "reasonable probability" that, but for the deficiency, "the result of the proceeding would have been different." Id. at 694.

* * * *

In evaluating the evidence of whether an attorney's representation of a criminal defendant is deficient, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689; see Bloomer v. United States,

162 F.3d 187, 1923 (2d Cir. 1998). Clark v. Stinson, 214 F.3d 315, 321 (2d Cir. 2000).

A. Trial Counsel

Petitioner claims that his trial counsel rendered ineffective assistance "in that [they] waived [his] right to a jury trial without [his] consent, violating his 6th and 14th Amendment rights . . . ." Pet.'s Motion for Judgment, ¶ 1. Courts indulge a presumption that a criminal defendant has not waived fundamental rights guaranteed by the Sixth Amendment, including the right to jury trial and the right to counsel. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938). However, a defendant may waive these fundamental rights. Waiver requires "an intentional relinquishment or abandonment of a known right or privilege." Id. Whether a defendant has intelligently waived a fundamental right "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Id. 9

There are two seminal cases on a criminal defendant's waiver of his right to a jury trial: Patton v. United States, 281 U.S. 276 (1930), and Adams v. United States ex rel. McCann, 317 U.S. 269 (1942). In Patton, a federal defendant consented in open court to trial by less than twelve jurors after one member of the jury had to be excused due to illness. 281 U.S. at 286. The Court held that a criminal defendant may waive his Sixth Amendment right to be tried by a jury of twelve. See id. at 290, 298. The Court stated that "before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." Id. at 312. The Court cautioned that "the duty of the trial court [to ensure that consent is express and intelligent] is not to be discharged as a mere matter of rote, but with sound and

advised discretion . . . with a caution increasing in degree as the offenses dealt with increase in gravity." Id. at 312-13. In Adams, a federal criminal defendant waived his right to trial by jury in writing while proceeding without the assistance of counsel. 317 U.S. at 270-71. The Court ruled that "an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury," even without the guidance of counsel. Id. at 275. The Court rejected a mechanical rule that would preclude a waiver except on the advice of counsel stating, "whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case." Id. at 277-78. Whether the defendant was represented by counsel is one circumstance to be considered. Id. at 277.

Petitioner's claim that his trial counsel rendered ineffective assistance by waiving a jury trial without his consent is based solely on his own testimony, which has been contradicted by the testimony of his lawyers. As noted earlier, he claims that he initially agreed to a court trial on the assumption that a jury would be impaneled and, when he learned he was mistaken, he promptly told his lawyers he wanted a jury trial but they told him it was too late. The state habeas court rejected petitioner<s testimony as "not credible." The state court's adverse credibility finding is amply supported by the testimony at the habeas hearing provided by petitioner's counsel, which the state court was clearly entitled to credit. Given the state court's adverse credibility finding, petitioner's claim that his trial lawyers waived a jury trial without his consent must be rejected as unfounded.

B. Appellate Counsel

Petitioner's claim that his appellate counsel was ineffective appears to be based on two distinct grounds: the appellate lawyer's failure to challenge the waiver of a jury The

Supreme Court has ruled that the Constitution requires an on-the-record canvass of a defendant before his guilty plea can be accepted. See Boykin v. Alabama, 395 U.S. 238 (1969).

Arguably, Boykin can be read to require a similar on-the-record canvass before a defendant can waive his right to a jury trial.
The Court noted that a guilty plea waives the right to a jury trial. 395 U.S. at 243. The Court also cited Carnley v. Cochran, 369 U.S. 506, 514-15 (1962), for the proposition that the record or other evidence must show that an accused intelligently and knowingly waived his right to counsel. Id. at 242. But neither the Supreme Court nor any Circuit Court of Appeals has extended the strict Boykin requirement to the waiver of a jury trial.

Trial by petitioner's trial counsel without petitioner's consent (which petitioner appears to refer to as "the illegal waiver"); and the lawyer's failure to challenge the lack of an on-therecord waiver of a jury trial by petitioner himself (which petitioner refers to as "the lack of a proper waiver"). The first of these grounds is clearly unavailing in light of the state habeas court's finding that petitioner did not tell his trial counsel he wanted a jury trial. The second ground is unavailing for the reasons explained below.

The Supreme Court has never held that a criminal defendant has a constitutional right to an on-the-record colloquy with the court, or some other procedure, before a waiver of the right to a jury trial can be accepted. Nor has the Court held that the Constitution requires such a waiver to be in writing.2 Moreover, the Second Circuit has stated that courts are not required to conduct a colloquy with a defendant waiving his right to a jury trial, although the Court recommended a colloquy to prevent challenges such as the one presently

under discussion. See Marone v. United States, 10 F.3d 65, 67-68 (2d Cir. 1993) (stating that "the trial court must satisfy itself that the defendant has intelligently consented," but explaining that a colloquy is not constitutionally required). Other Circuits are in agreement with this view. See United States v. Sammons, 918
F.2d 592, 597 (6th Cir. 1990) (colloquy not constitutionally required; defendant may attempt to show on habeas review that the waiver was not voluntary, knowing, or intelligent); United States v. Chrans, 869 F.2d 1084, 1087-88 (7th Cir. 1989)(determination of whether there has been a valid waiver depends on the circumstances of each case, and the Constitution does not mandate "how long the judge's explanation must be" or that the waiver bein writing).

In addition, careful review of the record discloses affirmative evidence that petitioner did waive his right to a jury trial. On habeas review, the court may determine whether the defendant waived this right by examining not only the record generated in the course of the underlying criminal proceeding but other evidence as well. See Chrans, 869 F.2d at 1087-88(in collateral proceeding, record or independent evidence must indicate a valid jury waiver). The transcript of petitioner's trial shows that he was asked at the outset of the trial whether he objected to the inclusion in the three-judge panel of the judge who had presided at his probable cause hearing and he said he did not. If, as he now claims, he did not want to waive his right to a jury trial (and had not intended to do so), the
Court's question gave him an opportunity to make that clear before the trial went forward. His failure to object makes sense in light of the testimony given by his trial counsel at the habeas hearing that he knowingly and intentionally waived his right to a jury trial and was canvassed by a judge in open court before his waiver was accepted. The written

decision of the trial court denying the motion for judgment of acquittal is consistent with the lawyer<s testimony; it states that petitioner "waived his right to a jury trial and elected to be tried by a three judge panel." See State v. Bruno, 1993 WL 280243,*1, No. 18-73668 (Conn. Super. July 14, 1993). Finally, as noted earlier, petitioner's pro se habeas petition filed in state court made no claim concerning the waiver of his right to a jury trial, although it raised numerous other challenges concerning the conduct of his trial counsel. Taking all this evidence into account, I have little doubt that petitioner waived his right to a jury trial.

As suggested by Adams, so long as there is affirmative evidence of a waiver, "the burden is on the [petitioner] to prove that the waiver was not knowing and voluntary." Strozier v. Newsome, 871 F.2d 995, 998 n.6 (11th Cir.1989) (discussing the right to counsel); see also United States v. DeRobertis, 715 F.2d 1174, 1178 (7th Cir. 1983). Petitioner has not met this burden.

II. Due Process

A. Failure to Canvass

Petitioner does not dispute the state habeas court's determination that his due process claim based on the trial court's alleged failure to canvass him concerning his jury waiver was procedurally defaulted in the trial court and on direct appeal. Accordingly, the claim cannot be considered on the merits unless petitioner demonstrates that the cause and prejudice test is satisfied. Under this test, "'cause' . . . must be something external to the petitioner, something that cannot be fairly attributed to him." Coleman v. Thompson, 501 U.S. 722, 753 (1991). "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the

risk of attorney error.'" Id. (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986).

Petitioner has failed to demonstrate "cause" as thus defined. His memorandum of law seems to suggest that he should be permitted to litigate his claim on the merits because his trial lawyers wrongly told him he could not have a jury trial and his appellate lawyer never met with him to talk about potential issues for appeal. See Pet.'s Mem. At 11-12. As discussed above, however, petitioner's allegation that he told his lawyers he wanted a jury trial must be regarded as false (the state habeas court having so found with ample support in the record).

Moreover, it is undisputed that petitioner never raised the issue
of the validity of the jury waiver with his appellate lawyer, although he did correspond with him concerning the appeal and thus had an adequate opportunity to do so. Because petitioner has failed to demonstrate cause as required by the cause and prejudice test, this due process claim cannot be considered on the merits.

B. Sufficiency of the Evidence
The Due Process Clause of the Fourteenth Amendment protects a defendant from being convicted of a crime in state court unless the prosecution proves every element of the offense charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). Petitioner claims that the evidence presented at his criminal trial is insufficient to prove that he intended to kill the victim, his friend Rusinko. Petitioner's challenge to the sufficiency of the evidence requires the court to determine whether the evidence, viewed fully and most favorably to the prosecution, would permit a rational trier of fact to find this essential element beyond a reasonable doubt.

Jackson, 443 U.S. at 319; Wheel v. Robinson, 34 F.3d 60, 66 (2d Cir. 1994). This standard of review recognizes the fact finder's responsibility to resolve reasonable conflicts in testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. Jackson, 443 U.S. at 319. This court may not re-weigh evidence or redetermine witness credibility. Marshall v. Lonberger, 459 U.S. 422, 434 (1983) ("Title 28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the trial court, but not by them.").

Under Conn. Gen. Stat. § 53a-54a, the elements of murder are "(1) intent, (2) causation and (3) death by killing as opposed to death by accident or suicide." Connecticut v. Rasmussen, 225 Conn. 55, 74 (1993). To prove the element of intent to kill, the State must prove beyond a reasonable doubt that the defendant caused the death of another "with the conscious objective to do so." Connecticut v. Patterson, 229 Conn. 328, 332-33 (1994) (citing Conn. Gen. Stat. §§ 53a-3(11) and 53a-54a). Intent to cause death may be inferred from the type of weapon used, the manner in which it was used, the nature and number of wounds inflicted, and events leading to and immediately following the death. Connecticut v. Sivri, 231 Conn. 115, 127 (1994). Intoxication is relevant to negate specific intent. Connecticut v. Austin, 244 Conn. 226, 239 (1998); see also Conn. Gen. Stat. § 53a-7. "Intoxication, however, does not automatically negate intent. . . . It is for the [fact finder] to decide, after weighing all the evidence adduced at trial, whether a criminal defendant's intoxication rendered him incapable of forming the intent required to commit the crime with which he is charged." Connecticut v. Downey, 45 Conn. App. 148, 156-57 (1997). The evidence presented at petitioner's criminal trial would permit a rational

trier of fact to find that he consciously intended to kill Rusinko, although he had been drinking and taking Valium that day. See Jackson v. Virginia, 443 U.S. 307, 325 (1979). Ignacak testified that when they arrived at the campsite, petitioner "stated that [Rusinko] had done some things to him in the past that angered him and he needed to pay . . .

After talking about it more and getting more angry, there was mention of killing him." (Pet.'s Ex. A 14-16.) Bingham corroborated her testimony. He testified that petitioner was upset with Rusinko because of a problem with his "driver's license and something to do with a drug deal connection." (Pet.'s Ex. B 20.) Bingham testified that petitioner "said he would like to beat David Rusinko to death . . . . He said that [Rusinko] was the one who called his drug connection . . . Then he asked if we could somehow make a suggestion that we go up to the upper campsite because it was – that is where he wanted the crime to be done." (Pet.'s Ex. B 25.) According to Ignacak, petitioner stated that shooting Rusinko would be "too good for him." (Pet.'s Ex. A 16.)

Ignacak testified that petitioner subsequently beat Rusinko and "let out reasons" as he was kicking him, "like, 'This is for the DWI, this is for the cocaine, this is for the loss of my license.'" (Pet.'s Ex. A 31.) She testified that "after the first few times he whacked Rusinko, he just seemed like he sobered up," and that his coordination seemed fine." (Pet.'s Ex. A 38-39, B 3.) Bingham testified that petitioner asked him for a knife, which Bingham refused to provide; that petitioner then tried unsuccessfully to cut Rusinko's throat using a pocket knife; and that petitioner then asked Ignacak for a piece of glass. (Pet.'s Ex. C 4, B 31.) According to Bingham, petitioner didn't like the piece of glass given to him, so he got another piece himself and once again tried to cut Rusinko's throat.

When asked if petitioner said anything during the assault, Bingham testified that petitioner said "his drug connection would not deal with him no more unless he took care of the problem"; that "he had a contract out on him for a week or two previous because of Dave"; and that "if he was to stop now, [Rusinko] would go to the police and would get in trouble anyways." (Pet'sEx. B 30.)

Petitioner's account differs markedly. He testified that he saw Rusinko fall to the floor, looked down and said something like "Oh, man, is he unconscious or is he breathing." He as he did before the Connecticut Supreme Court, petitioner argues that the evidence adduced at trial was consistent with the conclusion that Bingham and Ignacak murdered Rusinko, and because the state did not sufficiently refute this hypothesis . . . a reasonable fact finder could not have found the defendant guilty testified that he didn't remember anything after that until he woke up, looked for his drink, and saw Rusinko's body in the fire. He testified extensively about his drug and alcohol use that day, and presented expert testimony that he was in a state of blackout at the time of the killing as a result of severe intoxication. Petitioner admitted that after Rusinko was dead, he helped dispose of the body, shoveling the remains into a bag and disposing of the ashes in an outhouse, and that he helped conceal evidence of the crime, including painting over blood stains and disassembling and burying Rusinko's bicycle. He also admitted participating in a subsequent search to find Rusinko. The three-judge court concluded that petitioner was "not so intoxicated by alcohol and/or drugs at the time of the murder that he was incapable of forming a rational intent or of controlling his will." Bruno, 236 Conn. at 545 (quoting trial court's memorandum of decision). This finding is more than adequately supported by the testimony of Bingham and Ignacak. It is also supported

by the testimony of an expert psychiatric witness called by the State. Petitioner has presented no clear and convincing evidence to rebut the trial court's finding. U.S.C. § 2254(e)(1).3 beyond a reasonable doubt." Bruno, 236 Conn. at 545. The Supreme Court has specifically rejected the theory that the evidence offered in support of a conviction must rule out every hypothesis except that of guilt beyond a reasonable doubt.

Rather, "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record– that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson, 443 U.S. at 326.

III. Denial of Access To Records

Before and during his criminal trial, petitioner moved for disclosure and in camera examination of psychiatric records and school records pertaining to Bingham's and Ignacak's abilities to perceive, recall, and relate events. (See Resp.'s Ex. B at 15-18.) Under Connecticut law, psychiatric records are privileged and cannot be discovered, even pursuant to court order, without the consent of the holder of the privilege. See Conn. Gen. Stat. §§ 52-146d, 52-146e. Connecticut law permits disclosure of school records pursuant to court order on a showing that the records are relevant to the case or the witness<s credibility.

See Conn. Gen. Stat. § 10-15b(b); State v. James, 211 Conn. 555,
579 & n.10 (1989). The court denied petitioner<s request for in camera review, finding that he had failed to provide a sufficient foundation. The Connecticut Supreme Court affirmed this ruling. State v. Bruno, 236 Conn. 514, 521-37

(1996). Petitioner's claim before this court is that the denial of in camera review violated his constitutional rights to a plurality of the Court in Ritchie rejected the Confrontation Clause claim, stating that this Clause confers a trial right "designed to prevent improper restrictions on the types of questions that defense counsel may ask during crossexamination," id. at 52, and "does not compel the pretrial production of information that might be useful in preparing for trial." Id. at 53 n.9. A majority declined to examine the claim confrontation, compulsory process, and due process. The Supreme Court considered a similar claim in Pennsylvania v. Ritchie, 480 U.S. 39 (1987). In that case, the defendant was charged with sexually abusing his daughter. During pretrial discovery, he served a subpoena on the state protective services agency seeking access to his daughter's records, which contained a file relating to the charges against him and a report on a previous allegation of abuse. The state refused to comply on the ground that the records were privileged under state law; however, the relevant state statute allowed disclosure "to a court of competent jurisdiction pursuant to a court order." Id. at 43. The state court declined to order disclosure of the records and did not review them in camera. On appeal, the Pennsylvania Supreme Court held that the Confrontation and Compulsory Process Clauses gave the defendant a right to examine the records.

The Supreme Court analyzed the case under the Due Process Clause, which requires the prosecution to disclose to an accused evidence in its possession that is favorable to him and material to guilt or punishment. See Brady v. Maryland, 373 U.S. 83, 87
(1963).4 The Court ruled that the defendant had no due process under the Compulsory Process Clause, stating, "This Court has never squarely held that the Compulsory Process

Clause guarantees the right . . . to require the government to produce exculpatory evidence." Id. at 56. In view of these aspects of Ritchie, petitioner's claims based on these Clauses also are unavailing.

Right to conduct an unsupervised search of the state agency's confidential files, but was entitled to request specific material information. See Ritchie, 480 U.S. at 59-61. The Court stated that when confidential state files may contain material information, and the relevant state statute authorizes disclosure under court order, a court should review the files in camera and release to the defendant evidence deemed material. See id.

Importantly, under Ritchie, a criminal defendant may not require a court to review confidential records in camera "without first establishing a basis for his claim that it contains material evidence." Id. at 58 n.15; see also United States v. Leung, 40 F.3d 577, 582-83 n.1 (2d Cir. 1994) (citing Ritchie for the proposition that "in camera review should not be required unless defense establishes basis for claim that files contain material evidence"). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."
Ritchie, 480 U.S. at 57 (quoting Bagley, 473 U.S. at 682, 685); see also United States v. Coppa, 267 F.3d 132, 140 (2d Cir. 2001)
("[T]he scope of the government's constitutional duty – and, concomitantly, the scope of a defendant's constitutional right – is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial."). A "reasonable probability" is "a probability sufficient to undermine confidence in the

outcome." Ritchie, 480 U.S. at 57 (quoting Bagley, 473 U.S. at 682, 685).

"Mere speculation that a government file may contain Brady material is not sufficient to require a remand for in camera inspection, much less reversal for a new trial." United States v. Pou, 953 F.2d 363, 366-67 (8th Cir. 1992) (quoting United States v. Navarro, 737 F.2d 625, 631 (7th Cir. 1984)). Petitioner has not shown that the Connecticut Supreme Court's affirmance of the trial court's denial of in camera review is contrary to, or an unreasonable application of, Ritchie.

According to petitioner's motion for disclosure, he sought the records to impeach the witnesses' "ability to accurately and honestly relate information." (Resp.'s Ex. B at 16-17.) Under Ritchie, for petitioner to have a constitutional right to review of the records, he had to establish some basis for his claim that the records were relevant to the witnesses' ability to relate information to a material extent.

Petitioner showed that Bingham had substance abuse problems for which he received psychiatric treatment. (Pet.'s Ex. B 36-
37.) Bingham's father described him as "troubled" and "sick" (Pet.'s Ex. B 35) and a special education administrator, S. Patricia Keener, described him as "social[ly] and emotional[ly] maladjusted" (Pet.'s Ex. B 42). Petitioner contends that, because of the central role of alcohol in the events surrounding the murder, and because Bingham lied about the murder following the event, it was "reasonable to believe his records could have obtained impeachment information relative to his abilities to accurately perceive, recall and relate the events at issue." (Doc. #25 at 25.) It may be the records contained some useful information in general,

but petitioner failed to show that they were material on the issue of Bingham's testimonial capacity. Moreover, petitioner was free to ask Bingham on cross-examination about his alcohol consumption on that night and in general. Cf. Davis v. Litscher, 290 F.3d 943, 947 (7th Cir. 2002) (rejecting a similar habeas claim because, among other reasons, petitioner could have cross-examined the victim on her use of cocaine on the night of the events in question). He also could have impeached Bingham with the false statements he made after the murder. Because these lines of impeachment were available, and because petitioner made no showing that Bingham's emotional problems might have affected his testimonial capacity, it is not reasonably probable that disclosure of Bingham's school and psychiatric records would have changed the outcome of the trial.

Turning to Ignacak, petitioner showed that she had problems recalling things at school (Pet.'s Ex. A 42) and had interpersonal problems (Pet.'s Ex. A 46). Ignacak testified that her memory problem was "not that bad" (Pet.'s Ex. A 50), and Keener testified that Ignacak "didn't really have any memory problems, or associative problems, or organizational problems." (Pet.'s Ex. A 64). In light of this, the court could reasonably conclude that Ignacak's problems at school would have no bearing on her general testimonial capacity. In addition, petitioner has yet to articulate how Ignacak's interpersonal problems would have affected her testimonial capacity in a material way, other than to speculate that she might have been hostile or irrational toward others. Cf. Davis, 290 F.3d at 947 (noting that the petitioner "only argued to the state court that [the witness] was depressed, not delusional, and nothing in the record indicate[d] that her depression would cause her to misperceive reality"). In the alternative, petitioner argues that the trial court prevented him from laying a foundation for in camera review by

cutting-off questions concerning Ignacak's interpersonal difficulties and by refusing to permit him to refresh Keener's recollection by referring to Ignacak's school records. The Connecticut Supreme Court concluded that petitioner's inquiries concerning Ignacak<s interpersonal difficulties were not appropriately tailored to elicit information relevant to the issue for which the offer was made," which was "Ignacak's capacity accurately to perceive, recall and relate events." Bruno, 236 Conn. at 533. With regard to the argument that petitioner should have been permitted to use Ignacak's special education records to refresh Keener's recollection, the Court held that, in certain circumstances, a court should allow a witness access to a confidential document (assuming that witness has the authority to review it) without disclosure to counsel. Bruno, 236 Conn. at 536. In deciding whether to allow such review, the court should consider "the nature of the information sought" and "whether the witness whose memory the defendant seeks to refresh is the only person who feasibly could provide the information sought." Id. After articulating this standard, the Court found no abuse of discretion in the trial court's denial of petitioner's request to use the special education records to refresh Keener's memory. Id.

Petitioner has not demonstrated that the Connecticut Supreme Court's decision is contrary to, or an unreasonable application of, clearly established federal law. Even assuming the barred line of inquiry concerning Ignacak<s interpersonal problems would have revealed that she was often hostile to others, this would not have called into question her testimonial capacity to such a degree that petitioner can be said to have received an unfair trial. And the court<s refusal to permit petitioner to refresh Keener's recollection did not materially prejudice him because he could have obtained the desired information in other ways, such as from Ignacak, who

had already provided some details of her treatment on voir dire.

CONCLUSION

Accordingly, petitioner's motion for judgment (Doc. 24) is denied, and his application for a writ of habeas corpus is dismissed. His motion for an evidentiary hearing (Doc. # 21) is denied as moot. A certificate of appealability will not issue. The Clerk may close the file.

So ordered this 29th day of September 2006.

_____/s/_____

Robert N. Chatigny

United States District Judge